SUPREME COURT, U. S.
JUL 13 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1787

OHIO HOLDING COMPANY
Petitioner,

v.

P. E. MASHETER, DIRECTOR
OF HIGHWAYS, STATE OF OHIO
Respondent.

Brief in Opposition to Petition for Certiorari

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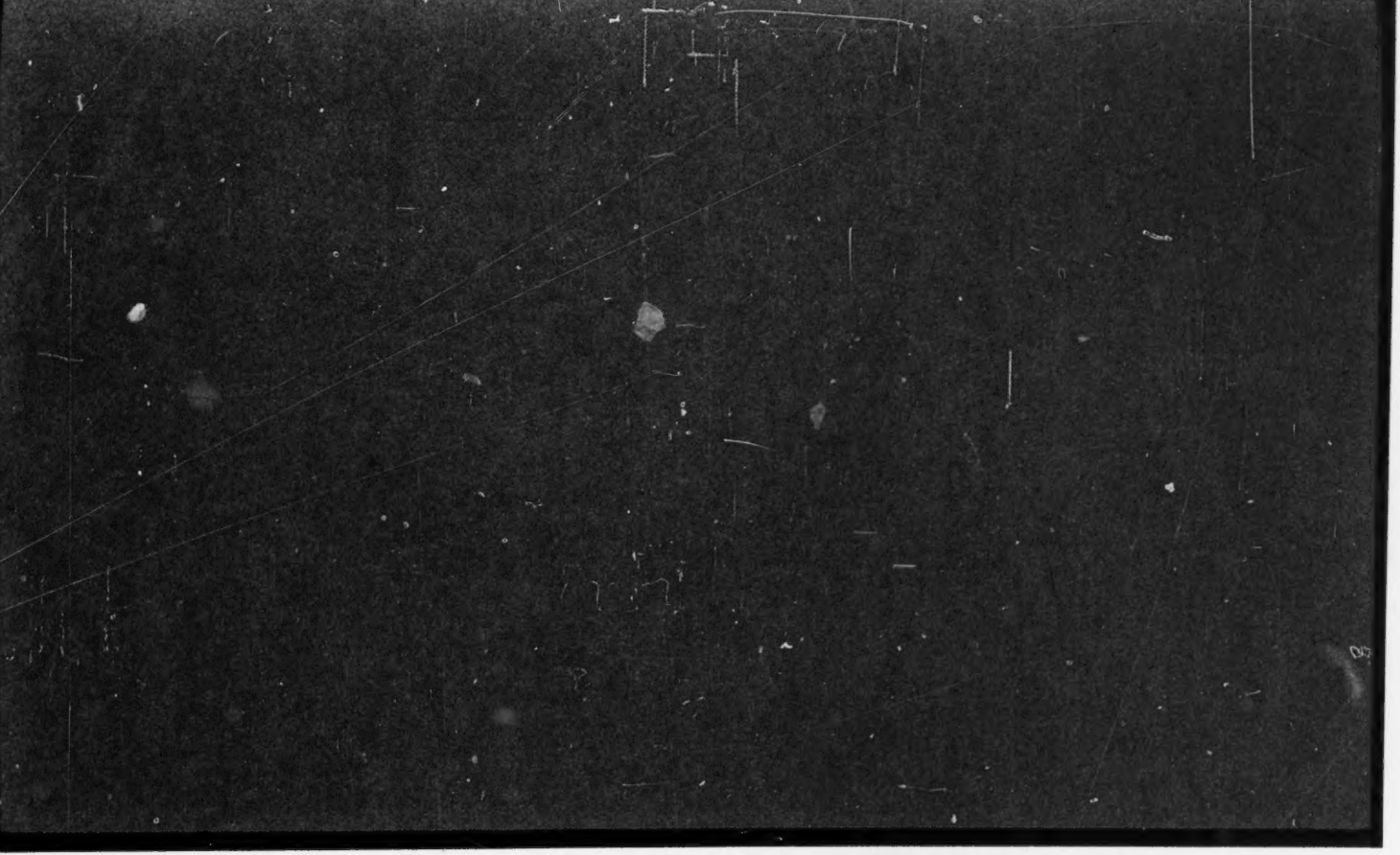

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BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

OPINIONS BELOW

The Supreme Court of Ohio wrote no opinion, however an order denying certiorari was filed by that court on February 28, 1974. The Court of Appeals for Franklin County, Ohio rendered a written decision which is attached as Appendix A, Petitioner's Brief, pp. 23-39 and which was reported at 38 Ohio App. 2d 49, ... N.E. 2d ..... (1974). On October 9, 1973, the Court of Appeals on reconsideration rendered a written unreported decision overruling the motion for reconsideration. Such decision is attached as Appendix B, Petitioner's Brief, pp. 40-42.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

The questions as presented by the Petitioner are not entirely descriptive of the real questions in the instant case. The two questions presented are:

1. Should the Court take jurisdiction of this matter where the Petitioner alleges that the possible application of a principle of evaluation as announced by the Supreme Court of Ohio in a case to which Petitioner was not a party (*Masheter v. Wood*, 36 Ohio St. 2d 175, 305 N.E. 2d 785 (1973)), will result in a denial of due process in the retrial of the within action?

2. May an expert appraisal witness in an eminent domain proceeding testify as to his opinion of the probability of a zoning change when such testimony would constitute speculation as to future administrative or legislative action?

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the following relevant constitutional and statutory provisions are contained in Petitioner's Brief (Appendix E, pp. 45-54):

Fourteenth Amendment to the Constitution of the United States; Section 19, Article I, Ohio Constitution; Sections 163.02, 163.03, 163.06, 163.09, 163.14 of the Revised Code of Ohio; Sections 3323.06 and 3331.06 of the Columbus City Code.

STATEMENT OF THE CASE

The petitioner, Ohio Holding Company, an Ohio corporation, was the owner of 30.617 acres of land located on the north side of East Main Street (U.S. Route 40) between Noe-Bixby Road to the west and McNaughten Road to the east, in the City of Columbus, Franklin

County, Ohio, on July 14, 1969, which was the agreed date of take.

From this plat of ground, the respondent, P. E. Masheter, Director of Highways, State of Ohio, by authority of Chapter 163, Revised Code of Ohio, appropriated 26.49 acres, including 1.56 acres presently occupied by East Main Street in fee simple including limited access, for the construction of Interstate 270, the Columbus Outerbelt, leaving a residue of 4.127 acres.

The part of the property taken was zoned R-1 Single Family Residential by the City of Columbus on the date of take. The residue, which abutted the northeast side of the ramp leading from East Main Street to I-270, was zoned C-4 Commercial by the City on May 29, 1968.

Prior to the appropriation the area along East Main Street, between Noe-Bixby Road and McNaughton Road was undeveloped in the vicinity of the subject property, except for a filling station, tavern and garage operated as a non-conforming use.

The subject property was included in an application to the City of Columbus to change the zoning on 91 acres from R-1 Single Family District to C-4 Commercial, Case Z 66142. On November 9, 1966, the Development Commission of the City of Columbus issued its report and recommended that the application by denied.

The sum of $224,451.00 was deposited by respondent Director of Highways with the Clerk when this case was filed in the Common Pleas Court of Franklin County, Ohio. The case was tried before a jury which rendered a verdict in the amount of $608,000.00 compensation, $50,000.00 damages, a total of $658,000.00, and a judgment in this amount was filed March 7, 1973.

Upon appeal by the respondent, the Court of Appeals of Franklin County, Ohio, correctly reversed this judgment

and ordered a new trial because the trial court erred in its refusal to strike the testimony of the petitioner's expert real estate witness, George Little. Mr. Little's testimony should have been stricken in that he based his valuation of the land on a higher use than that permitted under the then existing zoning regulations. In addition, the Court of Appeals reversed because the trial court failed to instruct the jury as to the consideration which should be given to the existing zoning in determining compensation.

The petitioner's motion to certify the record was denied by the Ohio Supreme Court. Also, the Ohio Supreme Court overruled the appeal of petitioner as a matter of right finding no substantial constitutional questions of law.

ARGUMENT

A. TO ALLEGE THAT THE POSSIBLE APPLICACATION OF A PRINCIPLE OF EVALUATION AS ANNOUNCED BY THE SUPREME COURT OF OHIO IN ANOTHER CASE (MASHETER v. WOOD, 36 OHIO ST. 2d 175, 305 N.E. 2d 785 (1973)), WOULD RESULT IN A DENIAL OF DUE PROCESS IS TO CREATE AN ISSUE WHICH IS NOT RIPE FOR ADJUDICATION.

It is clear that the United States Supreme Court does not render advisory opinions. *Muskrat v. United States,* 219 U. S. 346 (1911). To adjudicate a constitutional issue, a concrete legal issue, which is not presented as an abstraction, is required. *United Public Workers of America v. Mitchell,* 330 U. S. 75 (1947). The present case is not ripe for adjudication. There has been no injury suffered herein. *Socialist Labor Party et. al v. Gilligan,* 406 U.S. 583 (1972).

In the present cause, the petitioner has sought to have this Court adjudicate an issue which is hypothetical

in nature. The petitioner has alleged that at a retrial it will be denied due process of law if the rule of evaluation of *Masheter v. Wood*, 36 Ohio St. 2d 175, 305 N.E. 2d 785 (1973) is applied. To decide this issue this Court would be forced to speculate if such principle of evaluation would in fact be applied, how it would be applied, and even if it were applied, whether it would result in an unfavorable verdict to the petitioner. The injury of which the petitioner complains has not occurred and may never occur. "Determination of the scope and constitutionality of [principles of evaluation] in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *International Longshoremen's Union v. Boyd*, 347 U. S. 222, 224, (1954).

The petitioner should be unable to litigate the question of whether the application of *Masheter v. Wood, supra*, at a retrial would result in a taking of property without due process until such time as that rule of evaluation is applied. If, at that time, the petitioner should seek review before this honorable Court, then the Court would have a complete record of the controversy which would be appropriate for adjudication. The issue as presented by petitioner results in a hypothetical question, and it is one which is not ripe for adjudication.

B. AN EXPERT APPRAISAL WITNESS IN AN EMINENT DOMAIN PROCEEDING MAY CONSIDER USES OF THE PROPERTY BEING APPROPRIATED OTHER THAN THOSE PERMITTED UNDER PRESENT ZONING RESTRICTIONS, BUT THE EXPERT WITNESS MAY NOT TESTIFY AS TO HIS OPINION OF THE PROBABILITY OF A ZONING CHANGE FOR THE REASON THAT SUCH TESTI-

MONY CONSTITUTES SPECULATION AS TO FUTURE ADMINISTRATIVE OR LEGISLATIVE ACTION. A REFUSAL TO ADMIT SUCH SPECULATIVE EVIDENCE DOES NOT DEPRIVE AN OWNER OF HIS PROPERTY WITHOUT DUE PROCESS.

The Appellate Court, in its decision of September 4, 1973 (Appendix A, Petitioner's Brief, pp. 23-39), held that an expert appraisal witness, in a land appropriation proceeding may consider uses of the land higher than those presently permitted under zoning regulations when testifying to the fair market value of the land being appropriated. However, such a witness, the court held, may not speculate as to the probability of a zoning change or amendment, nor may the witness ignore the present zoning laws and restrictions and base his testimony solely on a use not permitted by law. Such decision reflects the law of evaluation in the State of Ohio, *Masheter v. Wood*, 36 Ohio St. 2d 175, 305 N.E. 2d 785 (1973); *Sowers v. Schaeffer*, 155 Ohio St. 454, 99 N.E. 2d 313 (1951), and does not result in a taking of the petitioner's property without due process of law.

The rule of evaluation in eminent domain proceedings as set forth by the Supreme Court of Ohio is well-formulated and well-defined. The main principle of evaluation is found at paragraph three of the syllabus of *Sowers v. Schaeffer*, 155 Ohio St. 454, 99 N.E. 2d 313 (1951);

> The rule of valuation in a land appropriation proceeding is not what the property is worth for any particular use but what it is worth generally for any and all uses for which it might be suitable, including the most valuable uses to which it can reasonably and practically be adapted.

This standard has been subsequently approved and followed by the Ohio Supreme Court. *E.g. Thormyer v. Joseph Evans Ice Cream Co.*, 167 Ohio St. 463, 150 N.E. 2d 30 (1958); *Ohio Turnpike Commission v. Ellis*, 164 Ohio St. 377, 131 N.E. 2d 397 (1955). However, in the case of *Board of County Commissioners v. Thormyer*, 169 Ohio St. 291, 159 N.E. 2d 619 (1959), (hereafter referred to as *Thormyer)* the Supreme Court of Ohio expanded the standard set forth in *Sowers, supra.* In paragraph one of the *Thormyer* syllabus it is stated:

> In determining the value of land in an appropriation proceeding, the question to be determined is the worth of the property for any and all uses for which it may be suitable, including the most valuable uses to which the land can *lawfully*, reasonably and practically be adapted.
> [Emphasis added.]

Thus, *Thormyer*, added "lawfully" to the standard of evaluation announced in *Sowers, supra*, and indicated that the uses to be considered in the evaluation of land were those permitted under the existing zoning laws.

It is important to note that the *Thormyer* case involved deed restrictions limiting the use of the land to the maintenance of a children's home. In regard to determining the fair market value of this land, the Ohio Supreme Court delineated three courses of action as to what consideration should be given the deed restrictions. First, no consideration could be given to the deed restrictions which would result in a windfall to the landowner. Second, full consideration could be given to the deed restrictions which would result in a windfall to the appropriator. Third, consideration could be given to the deed restrictions balanced with consideration for the chance of having the deed restrictions removed by legislative or other action. 169 Ohio St. at 295. This third alternative was rejected as being too vague and too speculative. 169 Ohio St. at 298.

The Court, in *Thormyer*, decided to disregard the deed restrictions in order to determine the fair market value. This determination was based upon the theory that since the specified purpose of the donor could not possibly be fulfilled, then the Court would strive to implement the general intent of the donor under the doctrine of *cy-pres*. The Court found that the donor had not foreseen that the land would be appropriated for other uses, and, had he foreseen this, he would not have wished the deed restrictions to result in a benefit to the appropriator. 169 Ohio St. at 300.

It cannot be seriously argued that *Thormyer* supports the position that present zoning restrictions may be disregarded when determining the market value of land. There are obvious distinctions between the public policy purposes of zoning and the donor's intent as reflected in deed restrictions. Deed restrictions are the result of one person's desire for the disposition of his property reflecting the personal preferences or philanthropic nature of a single individual. Generally there is little regard to surrounding property. Zoning, on the other hand, is a comprehensive, well-planned system in the interests of the public-at-large and subject to legislative enactment and a valid exercise of the police power.

That the enlarged rule of *Thormyer* has been followed in Ohio is supported by *In Re Appropriations for Highway Purposes*, 20 Ohio St. 2d 43, 252 N.E. 2d 643 (1969), where the Ohio Supreme Court in a *per curiam* opinion stated that paragraph three of the syllabus of *Sowers v. Schaeffer*, *supra* and the *Thormyer* case were controlling. Even though that court quoted the *Sowers v. Schaeffer* syllabus instead of the *Thormyer* syllabus, the word "lawfully" was not eliminated from the test of highest and best use. This is indicated by the fact that the court cited *Thormyer* as authority in support of the *Sowers* case.

The Supreme Court of Ohio has very recently clarified the case law in this area in *Masheter v. Wood, supra,* wherein the syllabus states:

> In a land appropriation proceeding, opinion testimony of an expert appraisal witness as to the reasonabale probability of a zoning change to higher and more valuable use classification is not competent, for the reason that such testimony constitutes speculation as to future administrative or legislative action.

After stating that the rule of valuation in a land appropriation proceeding in Ohio is that which was announced in *Sowers v. Schaeffer, supra,* as enlarged by the word "lawfully" in *Board of County Commrs. v. Thormyer, supra,* the court then stated at page 177:

> This addition to the rule would seem to exclude uses which are prohibited by zoning regulations, from consideration in determining the highest and best use to which land may be adopted.

The *Wood* Court also noted that to hold that speculation as to the probability of a zoning change is incompetent is compatible with *Masheter v. Hoffman,* 34 Ohio St. 2d 213, 298 N.E. 2d 142 (1973), which stated that each case must be considered on its own facts. The opinion in *Wood,* at page 178, states:

> An expert witness may testify as to these factors within his particular knowledge and expertise which would indicate the likelihood of a zoning change, such as a change in land use in the area, prior rezoning activities, or sales prices of comparable properties which are higher than their present use would justify. However, he may not give his opinion as to the probability of a zoning change. Such an opinion constitutes speculation upon the probability of future decisions of a zoning board or a legislative body. Therefore, such expert may not testify as to his opinion upon the probability of a zoning change.

Under the *Wood* holding, an expert appraisal witness may testify to those facts which indicate a likelihood of a change in zoning that affects the fair market value under present zoning conditions. That is, he may testify to what a willing buyer would pay a willing seller, in anticipation of a future rezoning, under the present zoning conditions. But the expert appraisal witness cannot specifically state that a rezoning is imminent and base his valuation on a higher use than that permitted by present law.

Thus, as in the instant cause, where each expert appraisal witness agreed that the highest and best use of the property under the existing zoning was to hold in anticipation of a future rezoning, the expert appraisal witness may testify to those facts which would induce a willing buyer to pay a willing seller more than the market value than is justified under the present residential zoning classification. The fair market value, then, must be the value of the land for residential purposes under the existing zoning (plus some value representing the anticipation that the property might be rezoned). The added value would be determined by the risk involved in holding the property for a more valuable use in the future.

However, in the instant case, the landowner's expert appraisal witness completely disregarded the existing zoning and testified that he found the highest and best use to be commercial, not to hold in anticipation of rezoning. Since this testimony was based upon the value of the property for uses not allowed under existing zoning, the appellate court was correct in reversing the trial court which admitted the evidence. This testimony is incompetent under the *Wood* rationale in that the witness based his valuation on sales of lands zoned commercial at present and not on sales of comparable residential land whose sale prices are higher than their present zoning use would justify. Thus, where, as in this case, upon cross-examination it

is determined that an expert appraisal witness has based his valuation of land on a use higher than that permitted by existing zoning restrictions, and where the witness ignores the present zoning laws, then, the court is correct in striking such testimony under *Masheter v. Wood*. To do so does not deprive an owner of its property without due process of law.

Because the Supreme Court of Ohio has spoken decisively and effectively in *Masheter v. Wood, supra,* stating the rule of evaluation to be that of *Sowers v. Schaeffer, supra,* as enlarged by *Board of County Commissioners v. Thormyer, supra;* because the *Wood* decision delineates what testimony concerning future rezoning is competent; and, because the petitioner has failed to show how it has been denied due process of law, it is not necessary for this Court to grant the petition for certiorari.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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